

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DENNIS KOROTNEY,

Defendant-Appellant.

UNPUBLISHED
October 15, 1996

No. 168475
LC No. 93-004147

Before: Neff, P.J., and Jansen and G. C. Steeh, III,* JJ.

PER CURIAM.

Defendant was convicted by a jury of armed robbery, MCL 750.529; MSA 28.797, and was sentenced to eight to fifteen years in prison. Defendant appeals his conviction as of right and we vacate and remand for a new trial.

I

Defendant first argues that the trial court abused its discretion in failing to grant his motion for a new trial. We agree.

A

During the prosecutor's direct examination of the victim in this case, the victim indicated that defendant had a prior prison record. This testimony was not solicited by the prosecutor. Defendant's trial counsel immediately objected, and moved for a mistrial. The trial court denied defendant's motion, but gave a cautionary instruction to the jury. After giving the instruction, the court asked whether any of the jurors would not be able to disregard the testimony. One juror indicated that he could not disregard the testimony, and the trial court dismissed that juror. The court then again addressed the jury, and the following colloquy occurred:

THE COURT: You are excused. You may step down. Is there anyone else?

* Circuit judge, sitting on the Court of Appeals by assignment.

[Juror 8], you cannot. The question is whether or not [the statement] would influence or determine how you would decide this case

JUROR 8: I feel like it would.

Juror 8's statement was the last reference to the matter contained in the record.

B

The grant or denial of a mistrial is within the sound discretion of the trial court, and there must be a showing of prejudice to defendant's rights if error requiring reversal is claimed. *People v Gonzales* 193 Mich App 263, 265; 483 NW2d 548 (1992). If the failure of the trial court to grant defendant's motion deprived defendant of a fair trial, or resulted in a miscarriage of justice, the ruling must be reversed. *Id.*

C

The question in this case boils down to whether defendant's right to a fair trial was impaired. We conclude that it was. It is clear from the record that a juror who decided defendant's case was prejudiced by an improper remark.¹ Although the trial court attempted to cure the prejudice by giving a cautionary instruction, it is clear from the record that that attempt failed. Accordingly, we conclude that the trial court abused its discretion in failing to grant defendant's motion for a mistrial.

Because of our resolution of this issue, we need not address defendant's other appellate claim.

Defendant's conviction is vacated and this matter is remanded for a new trial. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Kathleen Jansen
/s/ George C. Steeh, III

¹ Although the prosecutor urges this Court to remand to determine whether the transcript was accurate, the mere accusation of an inaccuracy, without more, will not justify such action. *People v Abdella*, 200 Mich App 473; 505 NW2d 18 (1993). To the contrary, defendant submitted an affidavit of his trial counsel indicating that the record correctly reflects the colloquy between Juror 8 and the court.